United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1159

To be argued by
RICHARD I. ROSENKRANZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1159

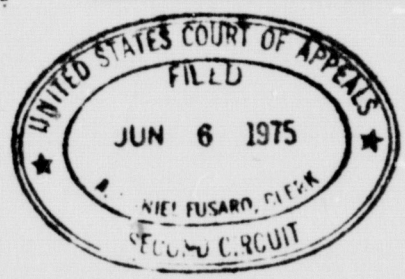
UNITED STATES OF AMERICA,
Appellee,

—vs.—

GANDALFO ALBANESE, et al.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF



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Preliminary Statement

Gandalfo Albanese appeals from a judgment of conviction entered against him on April 4, 1975, after a jury trial before the Honorable Orrin G. Judd, United States District Judge for the Eastern District of New York.

A three count indictment charged the defendant and four (4) others with: (1) Conspiracy to distribute a quantity of heroin in violation of Title 21, United States Code, Section 841(a)(1) (Title 21, United States Code, Section 846); (2) knowingly, intentionally, and unlawfully distributing approximately 106.9 grams of heroin on April 29, 1974 a Schedule I narcotic drug in violation of Title 21, United States Code, Section 841(a)(1); Title 18, United States Code, Section 2; and (3) with distributing 223 grams of heroin on May 8, 1974 in violation of the same statutes. The jury returned a verdict of guilty as to the defendant with regard to each of the three counts.

On April 4, 1975, the defendant was sentenced to a term of nine years imprisonment, to be followed by six years of special parole. The sentence was imposed as to each of the three counts, to be served concurrently.

Statement of Facts

The defendant had been jointly indicted with Jerry Battiloro, Stephen Goronsky, Frank DuBois and Nicholas Gregoris. Upon the trial the defendant Frank DuBois testified for the Government. It was never claimed by the Government that defendants Battiloro and Goronsky were acquainted with the defendant herein. Gregoris is presently awaiting trial.

The Government's Case:

Nicholas Alleva an undercover agent of the Drug Enforcement Administration testified that in the Spring of 1974 pretending to be interested in purchasing narcotics he had a meeting with Jerry Battiloro and Stephen Goronsky. He was provided with a sample of heroin (Tr. 19-20).*

Agent Alleva agreed to purchase an eighth of a kilogram of heroin for $5,300.00 from Battiloro and Goronsky in April, 1974.

In May of 1974 Agent Alleva negotiated a purchase of a quarter of a kilogram of heroin for $10,600.00 from Battiloro and Goronsky (Tr. 26-28).

On May 14, 1974 an agreement was reached amongst the parties for the delivery of a half kilogram of heroin for approximately $21,000.00. After delivery Battiloro and Goronsky were placed under arrest (Tr. 32-35).

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* "Tr." references are to the trial transcript; "A." references are to Appellant's Appendix submitted herewith.

Frank DuBois testified that he had been approached by Battiloro "to make a connection for him to purchase heroin" in the Spring of 1973 (Tr. 65). According to the witness he declined the offer. In the Spring of 1974 Battiloro again contacted DuBois for the same purpose. At this time DuBois was interested. He introduced Battiloro to an individual identified in the record as "Vinnie," in an effort to obtain narcotics. However, the effort proved fruitless (Tr. 67-68).

According to DuBois approximately a week after the "Vinnie" meeting he contacted the defendant Albanese who allegedly made further inquiries and reported back to DuBois a day or two later (Tr. 69-70).

The defendant allegedly informed DuBois that the price for an eighth of a kilogram of heroin would be $4,500.00 (Tr. 70).

According to the witness he obtained three deliveries of heroin from the defendant. He in turn gave them to Battiloro and Goronsky returning with the purchase price for each transaction to the defendant except for the final transaction.

DuBois appeared in court for Battiloro's and Goronsky's arraignment at which time he also was arrested (Tr. 82-83). Shortly after his arrest DuBois decided to cooperate with the Government (Tr. 84). In early May, 1974 wearing a Kel-transmitter DuBois went to a butcher shop on Christie Street in New York City owned by the defendant. According to DuBois the defendant demanded the money from the final transaction inasmuch as his suppliers were demanding payment from him (Tr. 84). Although DuBois was equipped to transmit the conversation he had on this occasion, because of an alleged malfunction, the conversation went unrecorded. Another meeting was agreed upon for June 3, 1974 at Bill's Bar. On June 3, 1974 DuBois again

wearing a recording device allegedly met the defendant Albanese (Tr. 85-86).

The ensuing conversation which DuBois testified was with the defendant Albanese concerning a variety of subjects including narcotics was electronically recorded.* The recording was played for the jury (Gov't's Exhibit 6 in Evidence) (Tr. 93-136).

Suffice it to say that the taped conversation dealt in major part with unpaid monies for narcotics; Battiloro and Goronsky and the fear the defendant and DuBois each shared of unidentified persons if "they were not paid their money."

Only the witness DuBois was able to testify that the voice on the tape was in fact that of the defendant.

POINT I

The Government failed to establish beyond a reasonable doubt the defendant Albanese's guilt as to the substantive counts. He is entitled to a new trial as to the conspiracy count in the interest of justice.

As we view the evidence in the light most favorable to the Government the Government did not prove direct contact and connivance between the defendant Albanese and the retailers in this case. Admittedly, even though a supplier and his retailers need not directly conspire with each other if they have reason to know that other retailers may be involved and have reason to believe that their own benefits derive from the operation and are probably dependent upon the success of the entire venture, a jury may find that each had, in effect, agreed to participate in the over-all scheme. See, *Blumenthal* v. *United States*, 332 U.S. 539,

557-558 (1947); *United States* v. *Friedman*, 445 F.2d 1076, 1080 (9th Cir. 1971); *Daily* v. *United States*, 282 F.2d 818 at 820 (9th Cir. 1960).

This would be true even though the individual defendants were not aware of the identity, number or location of the other participating retailers. See *United States* v. *Friedman*, 445 F.2d at 1080.

In applying these principles, however, it is vital to avoid confusing the similar purposes of numerous separate adventures of like character, with the single purpose of one over-all scheme. *Rocha* v. *United States*, 288 F.2d 545, 553 (9th Cir. 1961), quoting from *Cannella* v. *United States*, 157 F.2d 470, 476-477 (9th Cir. 1946). Under such circumstances the Government had the burden of connecting the defendant Albanese directly or circumstantially with the larger over-all scheme. *Daily*, 282 F.2d at 821-822.

In this case the most the Government proved through DuBois was that he had made a purchase from Albanese of alleged narcotics. There is absent a scintilla of evidence that what DuBois received from Albanese was the narcotics that the agent testified that he had purchased from the defendants Battiloro and Goronsky.

Defendants Goronsky and Battiloro could have had other suppliers. There is no proof directly or circumstantially linking as it must, the defendant Albanese and the Government undercover agent Alleva, the purchaser. The erudite trial Court indicated grave misgivings concerning the submission of the substantive counts in the indictment. However, after extended colloquy the Court reluctantly concluded that "it is a question of the weight of circumstantial evidence" and submitted the substantive counts along with the conspiracy count for jury consideration (9a-15a). The ensuing convictions on all three counts then followed. We submit that the Court erred in this regard.

There was testimony adduced at trial during the period at issue a heroin dealer named "Vinnie" had complained that Battiloro and Goronsky "were his customers" (14a). Unquestionably the testimony of defendants Battiloro and Goronsky was indispensable in order to establish the circumstantial nexus connecting the DuBois-Albanese transaction (if such testimony was in fact available) to Agent Alleva's purchases. This is clearly the case since DuBois was not able to link that which he received from Albanese to that which was delivered to the agent out of his presence. This testimony was not forthcoming and, thus, the Government has utterly failed by omission to meet their burden. We may go one step further and categorically state that the record is utterly devoid of even "hearsay" evidence to justify the submission of the substantive counts of the indictment. This case is unlike *United States* v. *Cianchetti*, 315 F.2d 584 (2d Cir. 1963); *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962) where all the conspirators were shown to know the extent of the scheme and the existence or identity of most or all of the other conspirators. See, also, *United States* v. *Stromberg*, 268 F.2d 256 (2d Cir. 1959). Relevant to the defendants Seto and DeSaverio.

The prejudicial overflow to the conspiracy count within the indictment is unmistakable. Serious consideration must be given to the concurrent sentence rule, as set forth in *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L. Ed. 2d 707 (1969). The fact that there were concurrent terms of imprisonment in this case does not justify sustaining the conspiracy conviction. If as we submit that the substantive counts within the indictment were erroneously submitted to the jury the defendant is entitled to a new trial as to the conspiracy count in the interest of fundamental justice since the jury patently considered all three counts as an entity by their verdict convicting on two counts where there was no supportive evidence. In sum in order to sustain the substantive convictions in this case it must me assumed that Albanese was the only possible supplier which is manifestly absurd.

POINT II

The evidence viewed in a light most favorable to the Government was insufficient to establish jurisdiction within the Eastern District of New York.

Under 21 U.S.C. Sec. 846, the crime of conspiracy is established with proof of an agreement among two or more persons to commit an offense under subchapter I of the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. Sec. 801 et seq., and proof that the defendant knew of the existence of the conspiracy and intended to participate in the unlawful enterprise. It is conceded that no overt act need be proved. *Irizzary* v. *United States*, 508 F.2d 960, 966 (2d Cir. 1974).

Here, there were three purported transactions between DuBois and Albanese all within the Southern District of New York. Assuming *arguendo* that an illicit narcotic transaction transpired between DuBois and Albanese, these transactions were peculiar to the Southern District of New York.

There were no lengthy negotiations between DuBois and Albanese involving a vast amount of drugs from which an inference could be permissibly drawn of a widespread dissemination of drugs beyond the situs of the Southern District. Nor was there any overt act established in any other jurisdiction essential to the consummation of the DuBois-Albanese transactions.

Evidently, this is a case where the Government has gambled and lost on the issue of jurisdiction. Reluctant to surrender a prosecution developed by the Eastern District Strike Task Force to the appropriate body i.e. the Southern District of New York the Government proceeded with a prosecution which was jurisdictionally in danger from its very inception.

POINT III

The Court committed inadvertent, but irretrievably prejudicial error within its charge to the jury.

The Court instructed the jury as follows:

> "Mr. Rosenkrantz, pointed out it is possible the heroin which Battiloro and Goronsky sold to Agent Alleva was something that they got from another heroin dealer or that the packages that were analyzed by the chemists were not in fact the packages that Mr. Albanese delivered to Mr. DuBois. You can determine from the evidence whether this leaves you with any reasonable doubt that the heroin that was purchased by the agent did in fact come from Mr. Albanese" (36a).

The Court unwittingly informed the jury of a side bar colloquy where counsel argued against the submission of the substantive counts to the jury (9a-11a).

Counsel duly noted his exception to this portion of the Court's instructions to the jury:

> "Mr. Rosenkrantz: I would specifically except to your Honor's charge in which your Honor indicated to the jury that it was my argument that Mr. Albanese may have delivered heroin to Mr. DuBois but that this was not the same heroin that Battiloro and Goronsky were alleged to have received. *I did not make that argument before the jury. I made that argument—that was a legal argument presented to the Court out of the presence of the jury, and I at no time conceded to the jury*" (41a-42a).

Of course, this instruction as given was a usurption of the jury's fact finding province.

In light of counsel's strenuous objections the Court was compelled to recall the jury and advise them accordingly i.e. "that the *defendant* does not concede that any packages were delivered to Mr. DuBois by Mr. Albanese. That's for you to determine on the basis of all the evidence in the case" (43a).

As given the further instruction was ineffectual, and indeed intensified the error. In the first instance the Court should have informed the jury that it has been mistaken—not that the defendant does not concede—thereby leaving the jury with the single inference to be drawn which is that the Court was constrained by actions of the defendant in their absence to alter its, the Court's considered charge and view of the evidence.

In light of this instruction it astounds the writer that the jury deliberated the event even the short period it did before convicting the defendant on all counts in the indictment. It is conceded that, the error here was one of inadvertence. However, coming as it did at the very threshold of the jury's deliberations, it would be unreasonable to conclude the error to be harmless or cured by the additional instructions which the jury had to be aware was forthcoming at the instigation of the defense.

POINT IV

In the event of an affirmance the appellant is entitled to be resentenced.

The defendant in this case was sentenced without the benefit of a pre-sentence report. It is true that the trial Court did indicate it would entertain a Rule 35 motion for reduction of sentence after "Appeals are effected." We make this point merely to preserve the defendant's absolute right to be brought before the Court for a *de novo* sentencing proceeding when his pre-sentence report is available.

A Rule 35 motion is one of discretion. Whereas, as here, the defendant was sentenced without the benefit of a presentence report his right to be physically present at such further proceedings is indispensable to due process of law. See, *United States* v. *Rosner,* 485 F.2d 1213.

CONCLUSION

For the foregoing reasons the judgment appealed from should be reversed and the indictment dismissed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

Louis Pinto, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1967 71st Street Brooklyn, N.Y.

That on the 6th day of June, 1975, deponent served the within Brief and Appendix for Appellant upon Ivan Schaeffer, c/o George Gelienski P.O. Box 899, Benj. Franklin Station Washington, D.C. 20044

Attorney(s) for the Appellee in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

Louis Pinto

This 6th day of June 1975

William J. Bachman

WILLIAM J. BACHMAN
Notary Public, State of New York
No. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1976